No. 90-41

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1990

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

CHARLES BENNETT VETZNER
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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

STATUTES INVOLVED

809.30 Rule (Appeals in felony cases). (1) DEFINITIONS. In this section:

(a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 or 974.06

* * *

(2) APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) A defendant seeking postconviction relief in a felony case shall comply with this section.

* * *

(h) The defendant shall file a notice of appeal or motion seeking postconviction relief within 60 days of the service of the transcript.

(i) The trial court shall determine by an order the defendant's motion for postconviction relief within 60 days of its filing or the motion is considered to be denied and the clerk of the trial court shall immediately enter an order denying the motion.

(j) The defendant shall file an appeal from the judgment of conviction and sentence and, if necessary, from the order of the trial court on the motion for postconviction relief within 20 days of the entry of the order on the postconviction motion.

STATEMENT OF THE CASE

Contrary to the assertion of petitioner, the postconviction motion filed by respondent Walker was part of his direct appeal. Petitioner stated the motion was brought under Wis. Stat. sec. 974.06--a collateral attack procedure modeled on 28 U.S.C. § 2255. Petition at 4 & n.4. In truth, the motion was filed pursuant to Wis. Stat. sec. 809.30(2)(h). Resp. App. 101-102. This is a provision in the Wisconsin Rules of Appellate

Procedure which allows a convicted offender to seek redress in the trial court prior to filing a direct appeal of the conviction. The provision may be used, as it was here, to convene an evidentiary hearing concerning a claim of ineffective assistance of counsel at trial. *See, e.g., State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (App. 1979).

Petitioner also notes that the postconviction motion was filed nearly 17 months after the initial jury verdict, Petition at 3, but fails to provide any explanation for this delay. Accordingly, it should be noted both that a substantial portion of this time period is attributable to the court reporter's failure to prepare a transcript of the jury selection process and that the Wisconsin Court of Appeals, which supervises compliance with appellate rule time limits, *State v. Rembert*, 99 Wis. 2d 401, 299 N.W.2d 292 (App. 1980), was fully apprised of the circumstances. Resp. App. 103-104.

SUMMARY OF THE ARGUMENT

Respondent contends that this court should deny review on the first issue raised for two reasons. First, petitioner failed either to raise his present claim in the state courts or to oppose in any fashion the urgings of respondent that the state appellate court exercise its discretion to resolve the underlying claim based on *Batson v. Kentucky*, 476 U.S. 79 (1986), in light of the factual record developed at a postconviction evidentiary hearing.

Second, the discretionary decision of a state appellate court to reach the merits of an asserted federal constitutional violation rather than to deny relief on the basis of a procedural default is a state law question not subject to review in this Court.

The second issue raised is worthy of review but is not ripe for disposition by this Court.

ARGUMENT

I. PETITIONER SHOULD BE FORECLOSED FROM BRINGING A CHALLENGE TO THE STATE COURT'S APPROACH TO THIS CASE BY ACQUIESCING IN THAT APPROACH.

The petition in this case may convey the notion that the state supreme court's decision to disregard the absence of an objection by trial counsel was totally unanticipated. However, the approach adopted by the court was one utilized previously and urged upon the court here by Walker without objection by petitioner.

In *State v. Cleveland*, 118 Wis. 2d 615, 348 N.W.2d 512 (1984), the Wisconsin Supreme Court reviewed an intermediate appellate decision finding trial counsel ineffective for failing to file a motion to suppress the fruits of a search. Rather than reviewing the issue in that framework, the supreme court decided that the importance of the issue warranted a resolution of the validity of the challenged search, notwithstanding the failure of defense counsel to make the appropriate objection.

In his appellate brief in this case, Walker not only claimed that he was deprived of his right to effective counsel, but also relied on the *Cleveland* case in an alternative argument that the court should dispense with the ineffective assistance of counsel framework and simply treat this case as a substantive violation of the rights provided by *Batson v. Kentucky*, 476 U.S. 79 (1986). Respondent's Wisconsin Court of Appeals

Brief at viii, 37. Petitioner made no response whatsoever to this issue and accompanying argument.[1]

Having ignored the *Cleveland* approach in his brief, counsel for petitioner was asked point blank during the Wisconsin Supreme Court oral argument in this case about the propriety of ruling on the *Batson* issue without regard to ineffective assistance of counsel. Petitioner's response was equally succinct: "I think you can do that." Transcript of Oral Argument at 48.[2] Not only did petitioner fail to raise its present challenge in the Wisconsin courts, but it also gave no indication that resolving the case under a *Batson* analysis was problematic in any way.

In light of petitioner's languid performance in state court, this court should, consistent with its decision in *Steagald v. United States*, 451 U.S. 204 (1981), decline to entertain the belated challenge. In *Steagald*, the government's Supreme Court brief on a fourth amendment issue raised a claim that the defendant lacked a reasonable expectation of privacy. This point had never been raised prior to the filing of the brief. Moreover, in the lower courts and in responding to the petition for certiorari, the government made representations implying that the defendant had a possessory interest in the area searched. This Court observed that a party loses its right to bring a challenge

> when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts or

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1 The briefs filed by the parties in the Wisconsin appellate court are available for review as they have been lodged with the Clerk of the Supreme Court.

2 The full Wisconsin Supreme Court oral argument certified transcript has also been lodged with the Clerk of this Court.

> when it has failed to raise such questions in a timely fashion during the litigation.

451 U.S. at 209.

That principle was applied in *Steagald* as the government lost its right to bring a privacy claim "through its assertions, concessions, and acquiescence." *Id.* at 211.

The conduct of petitioner here differs little from the behavior of the government in the *Steagald* case. Accordingly, this Court should likewise conclude in the case at hand that petitioner's failure to voice opposition of any sort, much less in the precise terms now being raised, to the state court reaching the merits in the absence of a contemporaneous objection precludes such a challenge from being mounted at this late date.

II. THE PROPRIETY OF THE WISCONSIN SUPREME COURT'S DISCRETIONARY DECISION TO REACH THE MERITS OF THE FEDERAL CONSTITUTIONAL CLAIM RATHER THAN TO RELY ON A PROCEDURAL DEFAULT TO PRECLUDE RELIEF IS A STATE LAW QUESTION WHICH WARRANTS NO FURTHER REVIEW BY THIS COURT.

This Court has frequently been called upon to assess the implications of a state court determination that a litigant has waived the right to invoke a federal constitutional claim as a result of a procedural default. Several basic rules have emerged from the decisions in this area. First and foremost, this Court will not consider an issue of federal law on direct review where the judgment in state court rests on an adequate and independent determination that the federal claim was forfeited by violation of a state procedural rule. *See Harris v. Reed,* ___ U.S. ___, 109 S. Ct. 1038, 1042 (1989). However, if the state court excuses the procedural

default and resolves the case on the basis of the substantive federal issue, this Court, too, is entitled to review the federal issue. *Caldwell v. Mississippi*, 472 U.S. 320, 327-28 (1985). Even if the state court relies on the procedural default to foreclose relief, this Court still retains the power to review the federal substantive claim if it determines that the supposed default is not an adequate or independent basis for the decision. *James v. Kentucky*, 466 U.S. 341 (1984); *see Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985).

A common thread running through all these decisions is that procedural default in a state prosecution is a state law question. Thus, for example, when this Court held in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), applied retroactively, it noted that the reach of the ruling could be limited if the States chose to enforce "the normal and valid" contemporaneous objection requirement. 432 U.S. at 244 n.8. This Court has made clear that "when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Yet this is because of the policy concern that a state default serving no legitimate state interest would "bar vindication of important federal rights." *Id.* at 448.

The approach advanced by petitioner in this case is inconsistent with the underlying premise of all the above-cited cases that the state court's reliance on a state procedural rule is, at the outset, a state law issue. Petitioner cites no precedent from this Court which suggests that a state court's refusal to rely on a state procedural rule to foreclose relief on a federal constitutional claim is itself a federal issue. That state court adoption of a procedural default principle is subject to review by this Court

does not lead logically to similar scrutiny of a state decision not to rest its decision on a default. As noted in *Henry v. Mississippi, supra,* the validity of a procedural default will be scrutinized in federal court to prevent unwarranted erosion of the substantive federal right. When the state court itself decides that vindication of the federal right should take precedence over preserving the procedural default principle, no similar policy concern warrants this Court's expansion of its jurisdiction to protect the procedural rule. Petitioner offers no justification to invert the rule of *Caldwell v. Mississippi, supra,* and have this Court review a procedural default which the state court excused rather than the substantive federal issue resolved below.

The specific situation here only reinforces the notion that petitioner is seeking review of a nonfederal issue, *i.e.*, whether the state court can exercise its discretion to resolve the substantive violation of the right to fair jury selection procedures rather than foreclose relief due to the absence of a contemporaneous objection. The Wisconsin Supreme Court's decision to analyze the facts here as a possible violation of the principles in *Batson v. Kentucky, supra,* is not based on any misinterpretation of that case, but on its own precedent in *State v. Cleveland, supra,* to examine the substantive constitutional issue once a full evidentiary record has been developed, albeit a record made in the context of an ineffective assistance of counsel claim. A grant of review here would do nothing either to clarify any lingering ambiguity in the *Batson* case or to resolve inconsistent interpretations of the decision. On the contrary, review of the issue posed can only cause disruption and confusion concerning "sensitive issues of federal-state relations . . ." *Michigan v. Long,* 463 U.S. 1032, 1039

(1983), by limiting state court authority to follow its own precedents to excuse a procedural default.

It should be emphasized that the state court resolution of the *Batson* issue here occurred only after the relevant facts were fully developed. The grant of relief did not derive from a conclusion that the prosecutor's removal of a black juror warranted relief without regard to full development of the facts. Petitioner offers no challenge to the finding or the reliability of the process for finding the critical facts which were essential to the ultimate legal conclusion. These facts include: that Walker is black; that actions of the prosecutor here eliminated all blacks from the jury; that the responses of the black prospective juror during *voir dire* did not suggest a "disqualifying attitude"; that the prosecutor directed no special inquiries to that juror; and that prosecution witnesses were white and defense alibi witnesses were black. Petitioner's App. 19. Moreover, while petitioner places emphasis on the prosecutor's avowed lack of a detailed recollection, no express challenge is made to the Supreme Court determination based on the record that the black juror in this case was stricken because the prosecutor knew nothing about him. Petitioner's App. 19.

Thus, this case is in a substantially different posture than cases such as *Jones v. Butler*, 864 F.2d 348 (5th Cir. (1988), and *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987), upon which petitioner relies to suggest a conflict. In *Jones* the state court had relied on the absence of a contemporaneous objection to foreclose relief and, consistent with existing Supreme Court precedent, discussed above, the federal court treated this rationale as an appropriate reliance on a procedural bar. Nothing in the decision suggests that the state courts had been foreclosed by *Batson* from

granting an evidentiary hearing and then resolving the substantive issue on the basis of the resulting record.

In *Forbes*, the federal court emphasized that a contemporaneous objection was necessary to prevent defense attorneys from "sandbagging" and to cure the alleged error by remedies short of reversal after conviction. 816 F.2d at 1011. While these cogent observations certainly support a contemporaneous objection requirement when the prosecutor strikes a black prospective juror, they are by no means unique. On the contrary, this Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977), adopted the same theories as *Forbes* in treating a state court reliance on the absence of a contemporaneous objection as a valid state procedural ground to deny relief to federal habeas corpus applicants, absent a special showing of cause and prejudice. In short, the contemporaneous objection requirement in a *Batson* context differs neither in form nor rationale from a similar rule during any other part of a state prosecution. No reason has been advanced or is otherwise apparent why the need to object to the striking of a black juror should be treated as a substantive federal constitutional issue while every other contemporaneous objection requirement is deemed a state procedural ground. The contemporaneous objection requirement serves valid state interests, as identified in the *Sykes* case, but it is clear that if a state court is willing to forego reliance on the procedural requirement and resolve a federal constitutional question on the merits, it is free to do so.[3]

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3 Petitioner argues that the Wisconsin Supreme Court decision at issue exposes virtually every state conviction since 1986 to review and reversal. Petition at 13. This dramatic assertion is largely premised on petitioner's erroneous belief that this case arose as a collateral attack on the conviction--the format which would be followed for convicted offenders seeking belated review

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No reason exists to treat a timely *Batson* objection as fundamentally different from all other objection requirements and to prevent a state court from bearing the consequences of reaching the underlying constitutional claim. Quite simply, the need to object to the striking of a black juror is no more a federal question than any other contemporaneous objection requirement or similar procedural rule which is employed and enforced in a state prosecution.

III. THE QUESTION OF HOW TO APPLY THE PREJUDICE STANDARD IN EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO MAKE A *BATSON* OBJECTION IS WORTHY OF REVIEW BUT CANNOT BE CONSIDERED IN THE PRESENT CASE.

Walker concedes as a general matter that this Court should at the earliest possible time review the seeming incongruity of the obligation to evaluate prejudice resulting from a deficient trial counsel performance and the established precedent treating *Batson* violations as not susceptible to harmless error analysis. However, this is the wrong case at the wrong time to use as a vehicle for clarifying the law.

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of a *Batson* claim. It is unlikely that the Wisconsin Supreme Court would exercise its discretion to reach the merits in such a collateral attack context. *Cf. United States v. Frady*, 456 U.S. 152, 166 (1982) (traditional plain error standard for direct appeals does not apply to collateral challenges to the conviction). Indeed, the exercise of discretion to reach the merits here hardly obliges the state court to do likewise even in other direct appeal cases where a contemporaneous objection is lacking. Moreover, the dire consequences predicted here are no different than those which could be theorized for any state court decision not to rely on a procedural default for denying relief.

This Court can hardly review the application of the ineffective assistance of counsel prejudice standard when no court has ever even determined that trial counsel's performance was deficient. Because the Wisconsin Supreme Court chose to resolve the *Batson* issue directly rather than in the context of an ineffective assistance claim, the second issue raised by petitioner is not ripe for review. Even if this Court were inclined to grant the petition, it seemingly could only reach the first issue, and if it were resolved in petitioner's favor, this Court then remand for further proceedings which might result in a determination that trial counsel's performance was deficient.

CONCLUSION

The petition for certiorari should be denied.

Dated this 10 day of October, 1990.

Respectfully submitted,

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APPENDIX

INDEX TO RESPONDENT'S APPENDIX

STATE OF WISCONSIN CIRCUIT COURT Branch 6 KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 86-CF-327

LIONEL D. WALKER,

Defendant.

DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

Defendant, by the undersigned attorney, moves for post-conviction relief, pursuant to Rule 809.30(2)(h), from the judgment of conviction entered on January 28, 1987, the Honorable Jerold W. Breitenbach, presiding, sentencing defendant to ninety-nine years of imprisonment for four counts of armed robbery, contrary to sec. 943.32(1)(b)(2), Stats., as follows:

1. The jury panel in this case included only one black member, *i.e.*, juror #944, Edward Echols.

2. The prosecutor in this case exercised one of his peremptory strikes to exclude Mr. Echols from serving on the jury.

3. Defense counsel neither lodged an objection nor sought an explanation from the prosecutor for this act, as he was entitled to. *Batson v. Kentucky*, 476 U.S. 79 (1986).

4. Defense counsel's omission was not a tactical decision and was prejudicial.

5. An identification of defendant at a line-up on September 5, 1986, was introduced at trial in regard to all four counts. Trial transcript of December 15, 1986, at 41, 85, 113, 127, 129, 151.

6. No pretrial motion to suppress the fruits of the September 5 identification procedure was filed by defense counsel.

7. Defense counsel's omission was not a tactical decision.

8. Had such a motion been properly filed, the court should have concluded that the line-up was the fruit of an illegal arrest and ordered both suppression of the identification made at the line-up, *see, e.g., Gardner v. State,* 314 A.2d 908 (Del. Super. 1973), and exclusion of an in-court identification at trial, *see, e.g., In re Woods,* 20 Ill. App. 3d 641,314 N.E.2d 606 (1974).

9. On the basis of the foregoing paragraphs, it is submitted that defendant was deprived of his state and federal constitutional right to effective assistance of counsel.

WHEREFORE, it is requested that the present motion be granted, defendant's convictions be reversed, and a new trial be ordered.

Dated this 7 day of July, 1988.

CHARLES BENNETT VETZNER
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Attorney for Defendant.

DISTRICT II

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, December 16, 1987

To:

Charles B. Vetzner
Asst. St. Pub. Defender

Clerk of Circuit Court
Kenosha, WI 53140

Barry M. Levenson
Asst. Attorney General

Hon. Jerold W. Breitenbach
Kenosha, WI 53140

Robert D. Zapf
District Attorney
Kenosha, WI 53140

You are hereby notified that the Court entered the following order:

#_____ - State of Wisconsin v. Lionel D. Walker
(L.C. No. 86-CF-327)

Before Brown, P.J.

On November 25, 1987, the defendant moved for an extension of time to file either a notice of appeal or postconviction motion. The defendant now moves to withdraw the motion on the ground that the extension is not necessary because an additional transcript will be filed and therefore the time will be extended automatically. The court agrees that the time will be extended automatically.

Upon the foregoing reasons,

IT IS ORDERED that the motion for an extension is dismissed as superfluous.

Marilyn L. Graves
Clerk of Court of Appeals

State Public Defender
Richard J. Phelps

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Judith P. Collins

The State of Wisconsin
STATE PUBLIC DEFENDER

131 W. Wilson St., 7th Floor P.O. Box 7862
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Chief, Trial Division
Marcus T. Johnson

Chief, Appellate Division
Eric Schulenburg

December 7, 1987

Ms. Marilyn Graves
Clerk, Court of Appeals
P.O. Box 1688
Madison, WI 53701

Dear Ms. Graves:

Re: State v. Lionel Walker, Kenosha County Case No. 86-CF-327

On November 25, 1987, I filed a motion in this Court seeking an extension of the deadline for submission of a notice of appeal or post-conviction motion. I am writing to request that this motion be withdrawn. On December 4, 1987, I learned that the court reporter has additional notes from the trial proceeding which have yet to be typed in transcript form. I requested that such a transcript be prepared on December 4.

In light of these circumstances, I believe that the deadline for filing a notice of appeal or post-conviction motion should be sixty days from my receipt of this additional transcript. Granting the motion which is now pending in the Court of Appeals, would, in light of these developments, only seem to create confusion as to the applicable filing deadline.

Thank you for your attention to this matter.

Very truly yours,

CHARLES BENNETT VETZNER
Assistant State Public Defender

CBV:jjn

cc: Office of the District Attorney
Kenosha County Courthouse
912 - 56th Street
Kenosha, WI 53140